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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

HOUSTON, EAST & WEST TEXAS RAILWAY Company et al., appellants, *v.* UNITED STATES, INTERSTATE COMMERCE Commission, et al., appellees.	No. 567.
THE TEXAS & PACIFIC RAILWAY COMPANY et al., appellants, *v.* UNITED STATES, INTERSTATE COMMERCE Commission, et al., appellees.	No. 568.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

The transcript references herein are to the transcript in No. 567.

The facts are fully stated in the opinion below (in No. 568), which is reported in 205 Fed., 380, and they also appear in the commission's report. (Tr., pp. 21–27; 23 I. C. C. Rep., 31.)

THE QUESTION.

The question raised is that which was expressly reserved in the *Minnesota Rate case* (230 U. S., at p. 419), namely:

> Whether the Interstate Commerce Commission has power to deal with discriminations resulting from a relation between interstate and intrastate rates.

In this particular instance the discrimination was not merely an incidental and indirect result of State action, such as were those dealt with in the Minnesota case, but a direct and intended result of such action. The Texas commission issued its order for the express purpose of obstructing interstate commerce by discriminating against it in favor of intrastate commerce. (Tr., pp. 21–26.) Its order was, therefore, void as a direct encroachment on interstate commerce within *L. & N. Ry. Co.* v. *Eubank* (184 U. S., 27, 36), as explained in the *Minnesota cases* (230 U. S., at p. 429), because (to quote the opinion in the later case) "it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the State law." (230 U. S., p. 429.) The *intention* to affect interstate commerce through action on intrastate commerce "links" the two together, and gives the State action that "privity"—with interstate commerce (Mr. Justice, now Mr. Chief Justice, White) in the *Northern Securities case* (193 U. S., at pp. 394–395), which distinguishes direct State action from indirect action, such as was involved in

the Minnesota case. This effect of the intention was recognized in *Swift* v. *U. S.* (196 U. S., 375, 396–397), and *Loewe* v. *Lawlor* (208 U. S., 274, 296–297). The brief of the governors in the State rate cases argued that absence of intent in those cases prevented the State action from being a direct regulation of interstate commerce, and that was a principal ground of the decision of Judge Smith McPherson upholding the State rates in the *Missouri rate case.* (*St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed., 317, p. 343.)

But, whatever value this point might have had to the railroads either in a suit brought by them to have the order of the State commission set aside (like the Minnesota case) or as a defense to them against an action for violation of the order (like the *Eubank case, supra*), it seems to have no importance here because this is a question not so much of the power of the Texas commission as of the power of the Interstate Commerce Commission. There is no basis apparent to us for claiming that Congress intended to give the commission jurisdiction over merely such "mixed" discriminations as may be the intentional result of State action and not over such as are the unintentional result, as in the Minnesota case. It seems impossible to imagine that Congress could have intended to draw such a distinction, and therefore we shall argue the case on the question whether the commission has authority to deal generally with these mixed discriminations.

FIRST POINT.

THE POWER TO DEAL WITH THE RELATION BETWEEN THE TWO KINDS OF RATES (*AS A RELATION*) LIES EXCLUSIVELY IN CONGRESS AND WAS BEYOND THE POWER OF THE STATES EVEN IN THE ABSENCE OF CONGRESSIONAL ACTION.

L. & N. Railroad Company v. *Eubank* (184 U. S., 27, 36, *supra*).

The *Minnesota Rate Cases* (230 U. S., 352, p. 429, *supra*).

Alabama & Vicksburg Railway Company v. *Mississippi Railroad Commission* (203 U. S., 496), which is relied on by the brief for appellants in No. 567 (p. 28), was a case in which both branches of the discrimination were intrastate, and it did not affect a relation between interstate and intrastate rates.

SECOND POINT.

SECTION 3 OF THE ACT TO REGULATE COMMERCE INTENDED TO PROHIBIT ALL DISCRIMINATIONS OVER WHICH THE POWER OF CONGRESS WAS EXCLUSIVE.

I. THE LANGUAGE AND PURPOSE OF SECTION 3.

The section provides as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation,

> or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (24 Stat., 379.)

It would be difficult to suggest language more sweeping or better calculated to confer upon the Interstate Commerce Commission all the power over railroad discrimination that Congress itself possessed. Indeed, this court in earlier cases has pointed out the comprehensive purpose of the act and its plain intent to cover the *whole* of the *exclusive* field of Congress. For example, in *Texas & Pacific Ry. Co.* v. *I. C. C.* (162 U. S., 197, 211, 212) the court said:

> The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, *the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject.* * * *
>
> *It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories as that going to or coming from foreign countries.*
>
> Having thus included in its scope *the entire commerce of the United States.* * * *

Nevertheless it is claimed that this particular class of discriminations, though a portion of the exclusive

field of Congress, was left untouched by the sweeping language of this section, and remains therefore in a state of chaos, uncontrolled by law.

No such claim has support in the language of the section which, as we have said, is as sweeping in affirmatives and negatives as it well could be. And as the beneficial purposes of the act require the broad construction, it should be given. *N. Y., N. H. & H. R. Co.* v. *I. C. C.* (200 U. S., 361, 391).

We do not need to amplify these considerations here because they are thoroughly presented by the opinion below, the Report of the Commission (T., pp. 29–34), and the brief of its solicitor; nor do we need to expound the practical importance of not having this portion of the exclusive power of Congress unexercised, for that is fully stated in the same opinions and brief and it was also before the court in vivid detail in the State rate cases and summarized in its opinion.

In passing, however, we may repeat that the ultimate effect of such a policy would be to permit that State which adopts the narrowest and most illiberal policy toward its railroads to set the standards for all the rates in its immediate region, and perhaps throughout the country at large. In other words, interstate rates would be made by the least generous State commission, and the adoption of a liberal and farsighted policy (encouraging upkeep from operating expenses, for example), although a matter of the greatest national importance, might be seriously obstructed if not rendered wholly impossible.

And regardless of the effect upon interstate commerce one State could pare its intrastate freight rates down to the irreducible minimum of confiscation. Other States could do the same. "Embargo may be retaliated by embargo and carriers will be halted at State lines." (*Okla.* v. *Kansas Natural Gas Co.*, 221 U. S., 229.)

That Congress did not intend rigidly to exclude *all* intrastate matters, even however vitally related to interstate commerce, is shown by its inclusion of such "mixed" matters in at least three other sections of the act: Section 1, concerning switch connections and through routes and joint rates; section 20, concerning reports (*I. C. C.* v. *Goodrich Transit Company*, 224 U. S., 207, supra); and section 23, concerning car distribution (*Hampton* v. *St. L. & I. M. R. Co.*, 227 U. S., 456).

Similarly in other recent statutes it has dealt with matters in which State and interstate commerce were interwoven, as, for instance, the hours of service act, 34 Stat., 1415 (*B. & O. R. Co.* v. *I. C. C.*, 221 U. S., 612–618, and *Northern Pacific R. Co.* v. *Washington*, 222 U. S., 370); the safety-appliance act, 32 Stat., 943 (*Southern Railway Co.* v. *United States*, 222 U. S., 20, 26); and the employer's liability act (*Mondou* v. *N. Y. N. H. & H. R. R. Co.*, 223 U. S., 1, supra, and *Pederson* v. *D. L. & W. R. Co.*, 229 U. S., 146).

No case has been found which compels a different view.

II. THE PROVISO IN SECTION 1.

It is claimed that the proviso in section 1 carves down the scope of section 3 so as to exclude this class of discriminations from its unrestricted general terms.

(1) But a study of this proviso and its history makes it clear that it really has no relation to *interstate* commerce and was not intended as a limitation upon the commission in respect to that commerce. It dealt exclusively with *foreign* commerce, and was incident to, as well as interwoven with, those clauses which defined the commission's power over that subject. Congress gave the commission power over all such foreign commerce as was a combination of internal railroad and foreign; and in this proviso it sought to disclaim clearly any intention, while doing this, to give the commission jurisdiction of any intrastate commerce which did not go into foreign commerce.

> SECTION 1. (As amended June 29, 1906, April 13, 1908, and June 18, 1910.) That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be consid-

ered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or

> from a foreign country from or to any State or Territory as aforesaid.

The words are "wholly within one State *and* not shipped to or from a *foreign country*, from or to any State or Territory as aforesaid"; and it means "wholly within one State *which* is not shipped to or from a foreign country, etc."

This was the explanation of the proviso given by Senator Cullom in his opening statement on behalf of the committee submitting the bill as follows:

> SECTION 1.
>
> * * * While the provisions of the bill are made to apply mainly to the regulation of interstate commerce, in order to regulate such commerce fairly and effectively it has been deemed necessary to extend its application also to *certain classes of foreign commerce which are intimately intermingled with interstate commerce*, such as shipments between the United States and adjacent countries by railroad, and the transportation by railroad of shipments between points in the United States and ports of transshipment or of entry when such shipments are destined to or received from a foreign country on through bills of lading. *To avoid any uncertainty as to the meaning of these provisions in regard to what may be at the same time in some instances State and foreign commerce*, it is expressly provided that the bill shall not apply to the transportation of property wholly within one State and not destined to or received from a foreign country. (Cong. Rec., 49th Cong., 1st sess., vol. 17, p. 4, p. 3472; Painter's Debates, p. 5.)

(2) If, however, the proviso is nevertheless construed as relating to the jurisdiction over interstate commerce, the court below was right in holding that it was a disclaimer and not a renunciation. This was also the view of it taken by this court in the *Goodrich Transit Company case* (224 U. S., at page 207):

> The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one State was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic.

The words "wholly within one State," if taken as relating to interstate commerce, are merely the converse of the phrase "among the States," used in the Constitution; and following the construction given to that phrase by *Gibbons* v. *Ogden* (9 Wheat., 1), and ever since, it means commerce "which does *not extend to or affect* other States." See cases quoted by the opinion below and the definition as stated in *Mondou* v. *N. Y. & H. R. R. Co.* (223 U. S., 1). (Quoted in the commission's report at Record page 31, and in the brief of the solicitor for the commission at page 28.)

III. THE CULLOM REPORT AND THE DEBATES.

The committee's report and the Debates throw very little affirmative light on the question, excepting that, as elsewhere stated, they show that the proviso in section 1 was not intended to affect the jurisdiction over interstate commerce but only over foreign commerce. They do demonstrate, however, the

general proposition that Congress intended to cover its exclusive field, and to leave vacant no part of its jurisdiction which *could not* be covered by the States.

This appears from the following passages of the Cullom report (S. Rept. No. 46, pt. 1, 49th Cong., 1st sess.):

> The decisions to which reference has been made conclusively establish, in the judgment of the committee, the following propositions as to the power of Congress, under the commercial clause of the Constitution, to regulate all railroads engaged in interstate commerce within the United States:
>
> (1) Commerce, in the meaning of the Constitution, includes the transportation of persons and property from place to place by railroad.
>
> (2) Commerce among the States includes the transportation of persons and property from a place in one State to a place in another State. Interstate commerce is all commerce that concerns more States than one, and embraces all transportation which begins in one State and ends in or passes through another State.
>
> (3) The power to regulate such commerce is vested exclusively in Congress without any limitations as to the measures to be adopted or the means to be employed in its discretion for the public welfare.
>
> (4) *The States being without power to regulate interstate transportation, the people must look to Congress alone for whatever regulation may be necessary as to interstate commerce* * * * (pp. 38–39).

In several of the decisions already quoted the courts have pointed out the impracticability of allowing each State to impose such restrictions as it pleased upon the commerce passing into, through, or beyond its borders, and have confined the jurisdiction of the State's authority to the commerce originating and terminating within its own domain—that which is strictly domestic. Commerce must be State or interstate, and either can be subject to but one jurisdiction and set of regulations. This is evidently the only safe rule. The disastrous effects of any other construction need not be enlarged upon.

In the exercise of their undoubted right to regulate, the States have been hampered by their inability to apply their regulations to interstate commerce, which comprises, in most instances, the greater portion of the business transacted within their borders by railroads. The essence of the effective regulation of business transactions is equality and uniformity, and this is impossible as to two transactions alike in every other respect when one reaches across a State line and the other does not. In the controversies that naturally arose over these questions in different States, as the records of the courts demonstrate, the railroad companies have not hesitated at every opportunity to insist upon and take advantage of the exclusive power of Congress to regulate interstate commerce. And, on the other hand, the records of Congress show that they have been equally swift to maintain and to deprecate interference with the rights of the States

whenever national regulation has been proposed. With its authority restricted to less than half of the business operations of the transportation companies subject to its jurisdiction, the obstacles encountered by a State in the exercise of a satisfactory supervision over the railroads engaged in business within its borders and in the administration of equal justice to all its citizens who might use them are apparent. When these difficulties, with all the opportunities they present for evasion of the State's authority, are understood, it is not a matter of wonder that the various State commissions should fail to accomplish all that has been expected of them, but it is rather a matter of surprise that they should have succeeded in bringing about the beneficial results which are acknowledged as a result of their labors * * * (pp. 44–45).

National legislation is necessary to remedy the evils complained of, because the operations of the transportation system are, for the most part, beyond the jurisdiction of the States, and, until Congress acts, not subject to any governmental control in the public interest.

The States have no power to regulate interstate commerce, and it appears from the evidence that even their control of their own domestic traffic is restricted and frequently made inoperative by reason of its intimate intermingling with interstate commerce and by the present freedom of the latter from any legislative restrictions. Some of the difficulties of effective State regulation in the absence of national legislation have been pointed out

elsewhere in this report, and illustrations have been given of the greater volume and importance of interstate as compared with State traffic. National supervision would supplement, give direction to, and render effective State supervision, and is especially necessary as the only method of securing that uniformity of regulation and operation which the transportation system requires for its highest development.

The clearly established fact that, by reason of the constitutional division of powers between the States and the General Government, the States have been able only to partially control the business of transportation within their own borders has been the principal inciting cause of the popular demand for national regulation, and is sufficient, in the judgment of the committee, to call for such action by Congress as will make effective the means of regulation found necessary and adopted by the States.

National legislation is also necessary, because the business of transportation is essentially of a nature which requires that uniform system and method of regulation which the national authority can alone prescribe (pp. 178–179).

Though here, and permeating the debates, the purpose is strongly stated to cover whatever the States could not cover, and *because* they could not cover it, especially in reference to discrimination, including long and short haul, it must be admitted that the particular application of this general principle to

"mixed" discriminations was not directly considered, so far as we can find, excepting in the following instances:

(*a*) Senator Brown said:

> Now, I understand it is contended that the Pennsylvania Railroad can charge 50 cents per hundred pounds from Pittsburgh to Philadelphia, being the same rate charged from Chicago to Philadelphia, because the freight passes all the way from Pittsburgh to Philadelphia in the State of Pennsylvania and over the Pennsylvania Railroad, and that it is therefore no violation of the act to charge as much from Pittsburgh to Philadelphia as from Chicago to Philadelphia.
>
> I confess I can not quite understand how this can be done without a violation of the act, which forbids the charging of a less rate for a longer than for a shorter distance. If the bill when properly construed means that, the rate being 50 cents per hundred pounds from Chicago to Philadelphia, the Pennsylvania Railroad may charge 50 cents from a station 20 miles from Philadelphia to the latter place, then I do not see how the passage of this provision of the bill into a law remedies complaints of inequality in rates or how such a law could be claimed to be equitable and just; and if the construction mentioned be the true one—that you may charge as much between any two stations on the line as you charge for the whole length of the line—then the bill would legalize greater inequality than any that is now practiced by the railroads against which the

greatest complaint is made. (Cong. Rec., 49th Cong., 1st sess., vol. 17, p. 4404; Painter's Debates, p. 70.)

(*b*) Senator Sewell moved an amendment to give the commission jurisdiction over an intrastate railroad if it competed with an interstate line between the same points. His explanation of this amendment and the disposition of it were as follows:

> In addition to that, this amendment would bring within the provisions of this interstate-commerce act as proposed the lines that run through one State in competition with lines that run through two or three States to the same point. I will give the instance of the New York Central running to a point on the Lakes, both its starting point and its terminus being within one State. It would not be within the provisions of the act without this amendment. There are lines running through New Jersey, New York, and Pennsylvania to and from the same points which come within the provisions of the act. That would be one instance where it would work to the disadvantage of the general railroad interests of the country. The New York line would be governed by the State law, while the lines running through New Jersey, and other States would be governed by the interstate-commerce act of Congress. I submit that it would be a great injustice to those lines to oblige them to come under this act, and leave the line running in one State to be perfectly free to act in the matter competition, in the matter of rates, and in the changes of their schedules as they saw fit.

Mr. INGALLS. Is this amendment in print?

The PRESIDENT pro tempore. It has been somewhat modified, but the original is in print. The question is on the amendment proposed by the Senator from New Jersey [Mr. Sewell].

Mr. MILLER. I suggest that this amendment lie over and be printed. Undoubtedly there will be another day for this bill. I confess I do not entirely understand the scope of the amendment. Certainly the case cited by the Senator as to a road in New York running from New York City to the Lakes is not exactly correct, because the bill as it now stands controls the transportation of all interstate commerce wherever the railroad company connects with or forms a continuous line to another State, or where part of it is by rail and part of it by water. So any New York line connecting with a line of steamers upon the Lakes would come directly under the provisions of the bill as it now stands, and it is not subject to the objection presented by the Senator.

Mr. SEWELL. The Senator from New York fails to understand my explanation. There are some lines that run through one State to a given point, while another line reaching the same competing point runs through two or three States. The latter would come under the provisions of this interstate-commerce bill, while the line running through one State would not come under the provisions of the bill without this amendment.

Mr. MILLER. May I ask the Senator a question? Is it possible that Congress can legislate upon a line confined entirely to the

limits of one State for the business upon that line not going any farther or connected with any line beyond it? If the object of the amendment is to produce that result, it seems to me that it should have a good deal of consideration before Congress shall undertake to assume any such authority as that. If the amendment proposes to do that thing, it had better be considered very carefully by the Senate before it acts upon it, or it had better reject it at the start.

Mr. McMILLAN. If this amendment is to go over and be printed, I desire to offer another amendment.

The PRESIDING OFFICER (Mr. Frye in the chair). An amendment to the pending amendment?

Mr. McMILLAN. No, sir; an amendment to the bill, so that it can be printed.

The PRESIDING OFFICER. The Senator from Minnesota proposes an amendment which he asks to have printed. That order will be made.

Mr. ALLISON. Let it be read.

The PRESIDING OFFICER. The proposed amendment will be read for information.

The CHIEF CLERK. The proposed amendment is to insert after the word "lake," in line 13 of section 4, the words:

"Or by a parallel railroad not within the jurisdiction of the United States."

Mr. CULLOM. The amendment offered by the Senator from New Jersey [Mr. Sewell] is exactly the printed amendment that is upon the tables of the Senators, except that as now presented it is amended to conform in the use of terms with

the other provisions of the bill. So I think there is no difficulty in Senators seeing what the amendment means without having any delay on account of it. * * *

Mr. INGALLS. Did the bill as originally introduced contain a provision similar in terms to this?

Mr. CULLOM. The proposition was originally before the committee and was considered by the committee and rejected, if I may be allowed to refer to what was done in committee. * * *

Mr. INGALLS. May I ask the Senator upon what ground in the opinion of the committee it could be claimed that Congress could exercise jurisdiction over a railroad both of whose termini were within the limits of a State?

Mr. CULLOM. The committee has not undertaken to exercise any such jurisdiction.

Mr. MILLER. I will suggest to the chairman that that portion of the amendment certainly never was considered by the committee favorably, or, as I understand, by any member of the committee. (Cong. Rec., 49th Cong., 1st sess., vol. 17, pt. 4, p. 3722.)

(*c*) Senator Morgan argued in opposition that the bill was fundamentally wrong in planting itself on the division by State lines, rather than upon State obstructions to interstate commerce. The substance of his argument is in the following passages:

I am not attempting to illustrate my point by presenting a difficulty in the execution of the law as proposed in this bill. I am endeav-

oring to show that it is a mistake, if not a legal impossibility, to measure the constitutional power of Congress to regulate commerce among the several States by the mere fact that the points of delivery and shipment of goods were in different States. This power of Congress rests on quite different grounds than these narrow and embarrassing views of the subject. * * *

It may be assumed, without any irreverence or any neglect of filial duty, that it is just as wrong for Congress to interfere with commerce in the States as it is for any State to interfere with the commerce between it and any other State. We ought, if we can, to find some proper and useful field of operation for the power of Congress to regulate commerce between the States that will not bring Congress and the State governments into constant and irreconcilable controversy over these delicate and important subjects.

In the case I have mentioned, of the transportation of goods 400 miles, from Alexandria, Va., to the Tennessee line and 20 feet across that line to the point of delivery, it is a patent absurdity to say that a law of the United States that controls the price of the freight through Virginia is not a law that controls and regulates commerce within Virginia. Such an act of Congress is quite as open to question upon constitutional grounds as a law of Virginia would be that provided a fixed rate per ton per mile on freight for the whole distance it is carried within that State.

> But under this bill the national character imparted to the freight by consigning it to Bristol in Tennessee rides down and defies the power of Virginia over her own people, her railroads that the State may own, and over commerce and trade in articles grown on her soil, and relegates the entire control of all these to Congress on a margin of ten feet of Tennessee soil included in the designated line of transit. The supremacy of the laws of Congress over those of Virginia in such a case ought to have a more rational basis. On this basis, no matter which of these laws gives the greatest security, justice, equality, and freedom to commerce, the supremacy is accorded to geography. Congress can not create nor can it prohibit commerce between the States in time of peace. (Cong. Rec., vol. 18, pt. 1, 49th Cong., 2d sess., p. 397; Painter's Debates, pp. 62–63.)

(*d*) And at one stage Senator Edmunds said, in connection with the long and short haul clause:

> Mr. EDMUNDS. So it is. That is perfectly true. I did not vote on the original proposition at all, as I came in just as the yeas and nays were being taken in Committee of the Whole. I am afraid that that is going too far, and that you are going to interfere with the purely local traffic of these lines in States and merely across a river, which is a nominal line for all business purposes between one State and another, and that you are going to carry your great objects so far as to hamper and interfere with the operations of these local affairs to the

injury not only of the general public but of the local public, because their interests are really interests in common, for all that they pay goes to make up the mass of money necessary to carry on the operations of the railroads and give a reasonable profit to those who invested their money in them.

While I agree that striking it all out and not amending it at all goes much further than my amendment proposes, I think it is going too far, and that it is safer for the objects of the bill and for what is truly interstate commerce not to undertake to carry the principle of equality of distance, and equality of haul, and equality of price into regions where we have no constitutional power to arrange it, as between the western and the eastern borders of Ohio, and then say that from the eastern side of Ohio to Pittsburgh, a distance of only 25 miles, if you please, or less, the railway shall be under a compulsion to make one charge, while from the eastern border of Ohio to the western border you can not touch it at all, and thus discriminate by the operation of an act of Congress between citizens of the same State engaged in the same business.

Therefore by such a provision, which carries it down to its utmost detail that we can, you are creating a division and a discordance and an injustice between the local traffic that is wholly within the State and that local traffic which happens to be a little out of the State and into it which only we can touch. If Congress had the power to regulate the whole thing in States as well as between States, then

> I should agree with the principle contained in the amendment of the Senator from West Virginia, that there ought to be equality of substantial distance and weight and that sort of thing everywhere; but we have not that power. (Cong. Rec., 49th Cong., 1st sess., vol. 17, pt. 5, p. 4404; Painter's Debates, p. 372.)

So far as we have found, there is nothing else in the report or in the Debates which could enlighten the court, excepting the general trend of the discussion, as indicating a broad purpose to cover all discrimination within the exclusive field of Congress.

CONCLUSION.

The judgment should be affirmed.

WINFRED T. DENISON,
Assistant Attorney General.

THURLOW M. GORDON,
Special Assistant to the Attorney General.

OCTOBER, 1913.

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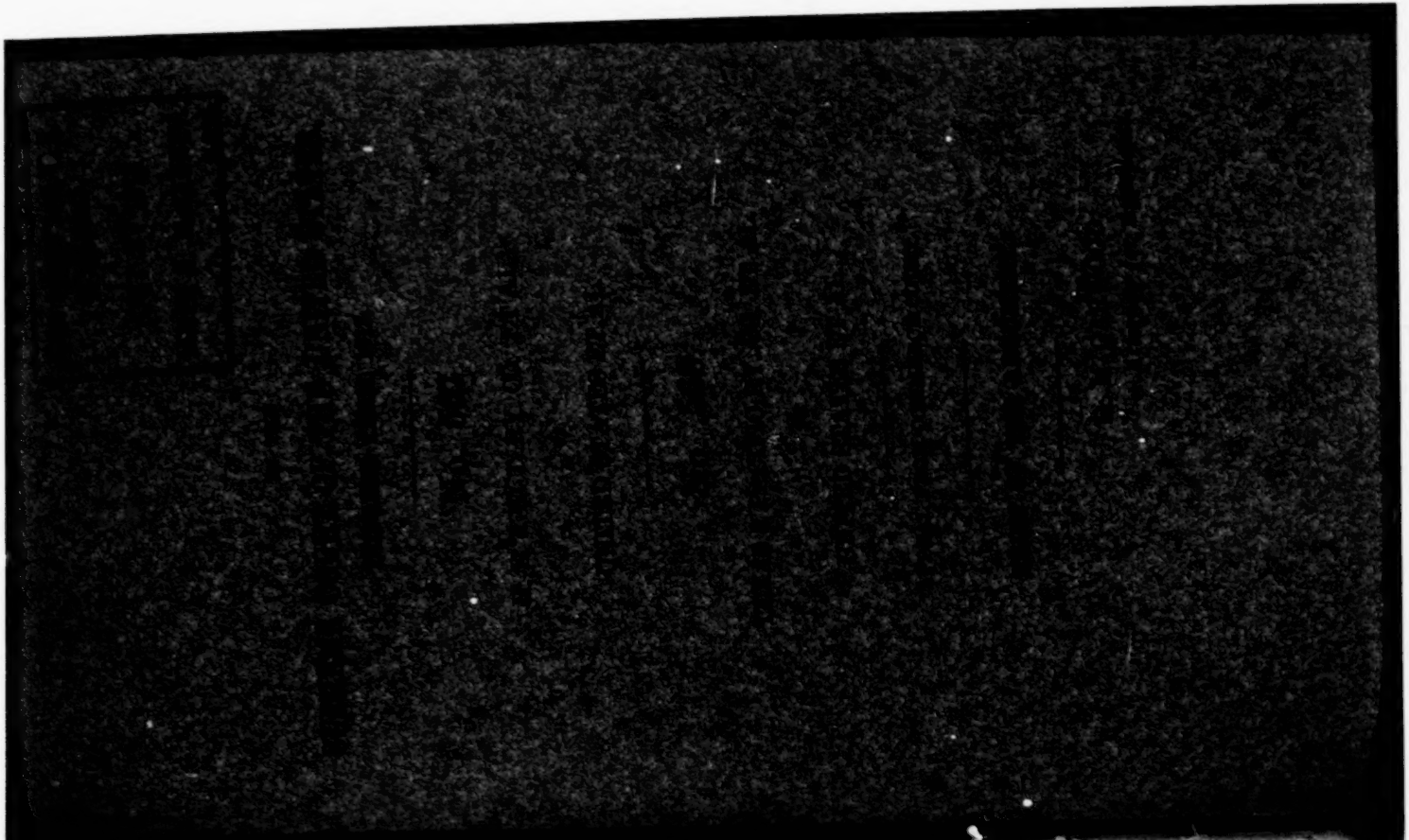

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TEXAS & PACIFIC RY. CO. ET AL.

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APPEAL FROM COMMERCE COURT.

BRIEF OF THE ARGUMENT.

These cases involve appeals from decrees of the Commerce Court dismissing bills brought to enjoin an order of the Interstate Commerce Commission.

The main proposition involved is whether under the act to regulate commerce the Interstate Commerce Commission has jurisdiction to regulate rates made by a State railroad

commission, upon the ground that they discriminate against the interstate rate.

Subsidiary to this is the proposition whether the carrier, by complying with the State rate, obedience to which is enforced by severe penalties accruing both to the State and to the individual shipper, is guilty of that voluntary and unlawful discrimination denounced by the statute.

Behind both lies the grave and more doubtful question—as to the authority of Congress to regulate rates between points wholly within a state, upon a transit which is no part of an interstate or foreign journey, because of an incidental effect upon interstate rates.

The facts in brief: Shreveport, Louisiana, is situated about forty miles from the Texas State line, two hundred and thirty-two miles from Houston, Texas, and one hundred and eighty-nine miles from Dallas. It competes with both cities for trade of intervening territory.

The rates, class and commodity, prescribed by the Texas Railroad Commission, which has full power under the Texas law to initiate and fix rates, are lower for like distances from Houston and Dallas towards Shreveport than are the interstate rates from Shreveport into Texas. The difference is substantial and injuriously affects the commerce of Shreveport.

The Railroad Commission of Louisiana filed complaint against the carriers, appellants herein, before the Interstate Commerce Commission, alleging, first, that the rates, class and commodity, from Shreveport into Texas, were unreasonably high, and, secondly, that the Texas State rates were discriminative. The Railroad Commission of Texas was not made a party to the proceedings.

The Commission held that the class rates from Shreveport to Texas were unreasonably high and ordered them reduced to the level of the Texas class rates for similar distances.

It did not hold that the commodity rates from Shreveport

to Texas were unreasonable *per se*, but did hold that the Texas rates, being substantially lower, were illegally discriminative and ordered the carriers to equalize them.

The decision was by a divided commission, Commissioners Harlan, Clements, and McChord dissenting upon the two first propositions. Commissioner Clark expressed doubts, but acted with the majority.

The carriers brought suit in the Commerce Court to enjoin the enforcement of the order as a whole.

That portion of the bills, however, which attacked the Commission's order as to the class rates was abandoned, these rates having been held unreasonable upon conflicting evidence. So that the sole question before the Commerce Court and the sole question here is as to the validity of that portion of the order affecting the commodity rates.

The Commerce Court held that the Commission had jurisdiction under the act to control an intrastate rate which discriminates against an interstate rate; that the rates prescribed by the Railroad Commission of Texas were void, and that obedience thereto by the carriers was therefore voluntary and unlawful. Judge Mack dissents from the opinion, but concurs in the result. We will discuss the points involved in the inverse order of their importance.

First. *If the Jurisdiction of the Interstate Commerce Commission be Conceded, the Discrimination is Not Voluntary or Illegal.*

The Texas Commission has full power, statutory and constitutional, to fix rates. To charge or collect a rate in excess of the Commission rate is, under the Texas law, an extortion, punishable by fine not to exceed five thousand dollars. A penalty not to exceed five hundred dollars also accures to each shipper on each shipment. Submission to these rates cannot be said to be voluntary. (E. T., Va. & Ga. Ry. *vs.* I. C. C., 181 U. S., 1; I. C. C. *vs.* C., N. W. Ry., 209 U. S., 122; I. C. C. *vs.* Deffenbaugh, 222 U. S., 48; L. & N. Ry. *vs.*

Behlmer, 175 U. S., 648; I. C. C. *vs.* L. & N. Ry., 190 U. S., 273; A., T. & S. F. Ry. *vs.* U. S., 190 Fed., 856.)

The Commission apparently holds that the Railroad Commission of Texas designedly installed these rates for the purpose of discriminating against Shreveport. But do the facts stated justify this conclusion of fact. There is nothing to show that the rates on the H., E. & W. T. Ry. and the H. & S. R. R., from Shreveport to Houston, are not the usual mileage rates applicable over all lines in Texas. This is the fact. It is true that the rates from Dallas eastward towards Shreveport upon the Texas & Pacific, the M., K. & T. Ry. Co. of Texas, and the St. L. S. W. of Texas are 20 per cent lower than the general scale of rates. There is nothing in the record to show that these rates are unreasonable *per se*. A mere disparity of rates does not *per se* constitute a discrimination. The action of the State Commission is presumptively just and reasonable. If the reevenue on the traffic as a whole was reasonable, it was within the discretion of the Texas Commission to make rates, lower perhaps than some other reasonable rate, yet sufficient to pay the cost of transportation with a margin of profit. The intent of the Railroad Commision of Texas is immaterial. As stated by Chief Justice Brown in Galveston Chamber of Commerce *vs.* R. R. C. of Texas, 145 S. W. (Tex.), 580, "neither the methods adopted by the commissioners in fixing rates, nor the motives or purposes prompting them, are subject to judicial inquiry."

The facts relied upon by the Interstate Commission are public reports of the Railroad Commission of Texas, showing a general intention upon the part of the Commission to procure by co-operation with the carriers a proper relation of State and interstate rates. At the most it shows an intent upon the part of the Commission to so fix the local less-than-carload distributing rates, in such relation to the carload interstate rates as to enable the State jobber to compete with the outside less-than-carload shipper. In other words, the

Commission announced the policy of fixing the less-than-carload distributing rates at such amount as will enable the jobber, say at Dallas, to buy goods in carloads from St. Louis, and ship to contiguous territory to the retail merchant in less-than-carload lots in competition with the St. Louis merchant who would ship direct in less-than-carload lots to the same retailer. The result of this policy has been to build up all over Texas jobbing centers of importance. If these rates are reasonable in themselves, can it be said that they constitute a discrimination against the St. Louis merchant? Must not each rate be judged by its own surrounding conditions, the density of the traffic, the operating revenues, the operating expenses? These discussions of general conditions in the official reports cited by the Louisiana Commission in its brief, have no connection with the immediate rates here involved, but are supposed to be indicative of a so-called "protective policy." But, suppose there was a logical connection! This court, in Smyth *vs.* Ames, 169 U. S., 466, and more particularly in the recent State rate cases, has held that in testing State rates the State and interstate revenues and values must be severely segregated. If the density of local State traffic is such, if the total State revenues and operating revenues are such, that low local State rates can be justified, are the people of that State to be deprived of these rates for the reason that interstate revenues, expenses and values justify a higher rate for the same distance. In this connection the opinion of this Court, in Simpson *vs.* Shepard, is pertinent, where, speaking through Mr Justice Hughes, and directly to this point, it said:

> "Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or authorize the Commission to prescribe either maximum or minimum rates for intrastate traffic."

And again it is said:

> "Similarly the authority of the State to prescribe what shall be reasonable charges of common carriers for intrastate transportation, unless it is limited by the exertion of the constitutional power of Congress is State wide. As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State,—to its cities adjacent *to* its boundaries as well as those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name but deny it in fact."

The Interstate Commerce Commission and the Commerce Court, in avoiding the force of the decisions of this Court above cited, say that it was the duty of the carriers to have contested these State rates in court, and because they did not do so, then submission was voluntary. The difficulty of attacking a rate upon a single commodity is well illustrated in M. & St. L. Ry. *vs.* Minnesota, 186 U. S., 267; Northern Pac. Ry. *vs.* North Dakota, 216 U. S., 579, and in Wilcox *vs.* Consolidated Gas Co., 212 U. S., 54, as well as by very recent decisions of this Court. Two of these appellants, the Missouri, Kansas & Texas Railway Company of Texas, and the St. Louis Southwestern Railway Company of Texas, would forfeit charter rights by applying for preliminary injunctive relief against the orders of the Railway Commission of Texas. Could these appellants even now safely follow the advice of the Commerce Court and treat these Texas rates as void? Could they rely upon the unofficial expression of a single member of the Commission, as legal proof binding the other members of the Commission, that the rates were designed to discriminate against Shreveport? Such litigation would indeed have been hazardous.

Recognizing the force of these considerations Commissioner Lane suggests that the carriers might have applied to the

Commission for relief. There are, however, no provisions in the Act to Regulate Commerce whereby a carrier can bring the officials of a State before the Interstate Commission, nor is there machinery provided whereby the orders of the Interstate Commerce Commission can be made effective against a State Commission. Indeed the act seems to proceed upon the theory that the State Commission is of equal dignity with the Federal body.

It is submitted, therefore, that discrimination has not been shown, that the facts found show no unlawful intent and that the rates complained of are not voluntary rates within the decisions of this Court.

Second. *The transportation affected is wholly within the State of Texas, constitutes no part of an interstate transit, and under the proviso to section one of the Act to Regulate Commerce the Interstate Commerce Commission has no jurisdiction to regulate the same.*

The terms of the proviso are clear and unambiguous. They are as follows:

> "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The majority of the Commission, in order to reach the conclusion that notwithstanding the very clear exclusion of intrastate commerce the Commission had jurisdiction of discriminative intrastate commerce, was under the necessity of overruling its own decisions of many years. Almost continuously since its creation it has steadfastly disclaimed the power it here seeks to exercise.

Memphis Freight Rate Case, 11 I. C. C., 180.
Saunders *vs.* So. Ex. Co., 18 I. C. C., 415.
Andys Ridge Co. *vs.* So. Ry., 18 I. C. C., 405.

There are many other cases, but these clearly indicate the views of the Commission. In the first case cited, Memphis complained that the Arkansas rates discriminated against it; in the second Pensacola complained of the Alabama rates from Mobile; in the Andys Ridge Coal Co. case complaint was made of an intrastate Tennessee rate on coal. These three cases are directly in point. In each case the Commission without dissent held that it had no jurisdiction to control the intrastate rate. In the New Jersey Fruit Exchange Case, 2 I. C. R., 84, decided shortly after the institution of the Commission, jurisdiction of all intrastate movement was under the proviso wholly disclaimed. It is interesting to note that Mr. Prouty, though concurring with the majority, in a case decided a year after that at bar, Southwestern Shippers Ass'n *vs.* A., T. & S. F., 24 I. C. C., 570, again reasserted the old doctrine, and held that the Commission had no power to regulate a purely intrastate rate. The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect, especially where failure to amend indicates an implied sanction of that construction by the legislative department (Robertson *vs.* Downey, 127 U. S., 607). This rule has been applied to the administrative holdings of the Commission (N. Y. & N. H. Ry. *vs.* I. C. C., 200 U. S., 361). With these important holdings of the Commission before it, had Congress intended to confer the jurisdiction which the Commission disclaimed, certainly when the important amendments of 1906 and 1910 were made, the intent of the act would have been made clear. The history of the act, and the decisions of this Court both before and after the passage of the act, show that it was not its purpose to invade the State jurisdiction, but to cover that field of regulation which the State could not enter. In the Granger cases, 94 U. S., 113, this Court held that the State had the right to regulate that portion of an interstate haul within the State. This doctrine was departed from in the Wabash case, 118 U. S., 557, where the long and short-haul

clause of the Illinois act was held an interference with interstate commerce. This great and leading case was decided in October, 1886, just a few months previous to the passage of the act. There was a strong dissent, and while the freedom of the interstate transit was preserved, the absolute right of the State to exclusively control its local commerce was as strongly asserted. With this notable decision immediately before it had Congress intended to confer upon the Commission these powers supposed hitherto to appertain wholly to the State certainly it would have employed words and phrases "apt and efficacious" to that end. In L. & N. Ry. *vs.* Ky., 183 U. S., 503, the long-and-short-haul clause of Kentucky was before the court. It was clear that the constitutional provision applied only to hauls within the State. It was nevertheless contended that it affected interstate commerce. But the Court said:

> "It may be that the enforcement of the State regulation forbidding discrimination in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect as to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct and not the merely incidental effect of enforcing the police power of the State."

The reference of the Government to the congressional debates, on page 17 of its brief, is unfortunate. It there appears that Senator Sewell, of New Jersey, moved an amendment to give the Commission jurisdiction over an intrastate road in competition with an interstate line between the same points. The amendment was rejected by the committee and the Senate.

It is a significant fact that neither the Commission nor the Commerce Court, nor the Government, agree either one with the other in their attempt to escape the plain meaning

and intent of this proviso. Commissioner Lane resorts to the doctrine of necessity, that the proviso is subordinate to section 3, and takes the position that the scheme of regulation would not be complete unless this power was conferred upon the Commission. Commissioner Harlan clearly exposes the fallacy of this argument and shows that so great a power was not to be conferred by construction.

The Commerce Court relies upon a dictum of its own in D. & R. G. *vs.* I. C. C., 195 Fed., 968; says that the proviso is not an exception but a disclaimer, and that it was intended by the proviso to exempt from the jurisdiction of the Commission "only that intrastate transportation which is not within the power of Congress to regulate." This would place Congress in the attitude of saying that there are certain fields of intrastate jurisdiction which the Constitution does not permit Congress to enter, and these the Commission may not enter. As to all others, however, undesignated though they may be, the Commission is unrestrained. This, we submit, is not only illogical in itself, but is in direct conflict with the rule of construction laid down by this court in I. C. C. *vs.* Ry., 167 U. S., 505, where this Court held that the granting of grave powers to the Commission was not to be inferred from doubtful and uncertain language.

The Government takes a third and radically different view and contends that the proviso has no relation to interstate commerce and was not intended as a limitation upon the Commission with respect to that commerce, but that it dealt wholly with foreign commerce. Thus construed the proviso is unintelligible.

These curious, subtle, and conflicting constructions never occurred to the Commission during the first twenty-five years of its history. They never occurred to this Court where in the Larabee Mills case, 211 U. S., in commenting upon the separate jurisdictions and the necessity of separate control it quoted the proviso as showing the congressional intent to leave the domain of domestic commerce to the State; nor in the Goodrich Transportation Co. case, 224 U. S., 1, where

it referred to the proviso "as showing the congressional purpose not to undertake to regulate a commerce wholly domestic"; nor in the Minnesota case, where, after quoting the proviso, it said:

> "Congress carefully defined the scope of its regulations and expressly provided that it was not to extend to purely intrastate traffic."

This court, speaking through Mr. Justice Brewer, in I. C. C. *vs.* Ry., 167 U. S., 505, in holding that under the act as originally passed the Commission had no jurisdiction to prescribe maximum rates, said that the transfer of such grave powers to an administrative body was not to be presumed or implied from any uncertain or doubtful language, and that apt and efficacious words must be used to that end. We look in vain in this act for apt and efficacious words to delegate to the Commission powers which Congress expressly reserved. We look in vain in the act for any machinery, process or permission, by which the officers of the State can be brought before the Commission or made amenable to its process.

Third. *Has Congress the Unlimited Power to Regulate Intrastate Commerce Because Conducted by Interstate Carriers, as Asserted by the Interstate Commission.*

The masterly review of all the decisions, and of rate regulation State and Federal, by this Court in the recent State rate cases, renders citation of authority unnecessary. It is believed that the reasoning of this Court in the Employer's Liability cases is an answer to the argument of Commissioner Lane, and of the Government in this case. It may be conceded for the purposes of this argument that the Federal Government may regulate and control transportation within a State, *if as matter of fact* it is essentially interstate in its character. For example, if traffic moves from a point within a State to another point within the State, on local bills, to

points of concentration, to be subsequently moved out to interstate or foreign points, the stoppage being temporary. Here the movement is intrastate, but the commerce is essentially interstate or foreign. Mere geography is not the test, and the Federal right to regulate attaches. It may be even conceded, as suggested by Commissioner Harlan in his dissenting opinion, that if a system of State rates are so low as, while not reaching the point of confiscation, to unduly burden carriers which are instrumentalities of interstate commerce, that Congress by appropriate legislation could control such a situation. Where, however, not only the geographical movement, but the essential nature of the commerce is intrastate, where property, being a part of the general mass of property of the State, at the inception of the movement, moves *in a completed transit* to another point in the State, there again to be mingled with the general mass of property in the State, here the facts do not exist to which the Federal jurisdiction can attach, and it is not believed that any decision of this court will establish the doctrine that such a movement, because of its remote and incidental effect upon interstate commerce, is subject to the control of Congress under its constitutional power to regulate commerce among the States.

Respectfully submitted,

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